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No 10-808
CAPITAL CASE

IN THE

Supreme Court of the United States

ALFONSO MORRIS,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

On Petition for Writ of Certiorari to the Alabama Court of Criminal Appeals

REPLY BRIEF OF PETITIONER

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Reply Brief of Petitioner

The State's opposition sidesteps the two questions in Mr. Morris's petition by incorrectly characterizing them both as "factbound," *see* Opp. 7, and therefore outside the purview of the Court as "erroneous factual findings." *See* Opp. 8, citing SUP. CT. R. 10. Contrary to the State's position, the questions presented address a division among the lower courts regarding the legal standards governing the use of (1) evidence of malingering, or even the suggestion of malingering, and (2) evidence of post-incarceration adaptive behavior to defeat otherwise substantiated evidence of mental retardation. In *Atkins v. Virginia*, 536 U.S. 304 (2002), the Court left it to the states to determine how mental retardation should be defined, but the Court emphasized that states cannot adopt definitions of mental retardation that cover a smaller group than those considered mentally retarded under the national consensus approach. *See id.* at 317. This case provides an opportunity for the Court to address these divisions and to provide clarity as to how mental retardation determinations are to be made.

I. The Lower Courts Are Divided As To Whether Evidence of Malingering and Post-Incarceration Adaptive Behavior Can Trump All Other Contradictory Evidence.

A. The State claims that a split of the courts on the first question presented in Mr. Morris's petition — specifically, Alabama and Mississippi on one side and Texas on the other — "hardly call[s] for this Court's immediate intervention." *See* Opp. 12. A split

among these particular states is of heightened concern, however, because these three states accounted for the majority of American executions in 2010. *See* The Death Penalty Information Center, Number of Executions by State and Region Since 1976, *available at* http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976 (last updated February 23, 2011). Indeed, as of the filing of this reply, Texas and Alabama have executed three of the eight individuals put to death so far in 2011. *Id.*

Contrary to the State's characterization of the first question presented, the trial court in this case did not weigh evidence of malingering. It instead confirmed the conclusion of the State's expert, Dr. King, that Mr. Morris's "malingering indicated that he was not mentally retarded." *See* Pet. App. 24a. In affirming that conclusion, the Alabama Court of Criminal Appeals also did not weigh this conclusion against the contradictory evidence that Mr. Morris's expert Dr. Allen Shealy presented, even though this contradictory evidence demonstrated that Mr. Morris is mentally retarded.

Moreover, Dr. Shealy's conclusion that Mr. Morris is mentally retarded accounted for any possible malingering. *Id.* at 154a. The State expert's statement that Mr. Morris had a higher IQ than tested ("*possibly* in the low 80s") because of malingering was only speculation. *See id.* at 22a (emphasis added). In fact, the decision of the Court of Criminal Appeals overlooked the findings of Dr. Shealy that someone could malinger on a test and yet still be mentally retarded. *See id.* at 154a. Therefore, the de-

cision of the Court of Criminal Appeals allowed one expert's claim of malingering to trump all other evidence to the contrary.

The Alabama Court of Criminal Appeals in this case and the Mississippi courts in *Chase v. State*, 873 So. 2d 1013 (Miss. 2004), *King v. State*, 23 So. 3d 1067 (Miss. 2009), and *Spicer v. State*, 973 So. 2d 184 (Miss. 2007), did not specifically state in their decisions that evidence of malingering "necessarily foreclosed" a finding of mental retardation. Those courts, however, applied exactly that line of reasoning. For example, the *Chase* court held that any expert testifying as to the mental retardation of a defendant must perform a malingering test and establish, with a reasonable degree of certainty, that "the defendant is not malingering." *Id.* at 1029; *see also King*, 20 So. 2d at 1075 (same); *Spicer*, 973 So. 2d at 209 (same). Similarly, the Court of Criminal Appeals confirmed a finding that Mr. Morris was not mentally retarded merely because there was an indication that he was malingering.

Conversely, the court in *Ex parte van Alstyne*, 239 S.W.3d 815 (Tex. Crim. App. 2007), confirmed a finding of mental retardation, even though there were indications that the defendant may have been malingering. The *van Alstyne* court emphasized the "important role of experts in screening defendants for mental health issues, including mental retardation" and credited the test results obtained by the defendant's expert. *Id.* at 818.

The State's formulation of this first part of Alabama's three-part test would permit courts to credit

evidence of malingering over any other contradictory or competing evidence — which is exactly what the Texas court in *van Alstyne* cautioned against doing. It also would fail to account for the possibility that an individual could malinger on an intelligence test and nevertheless be mentally retarded.

Moreover, the State's reliance on malingering tests ignores scientific findings that such tests are flawed and often result in false positives. Dr. Shealy testified at Mr. Morris's *Atkins* hearing in 2007 that the malingering test used to evaluate Mr. Morris — the same one that the Criminal Court of Appeals confirmed in its decision — was considered to be "not appropriate to be administered to people who are mentally retarded." Pet. App. 151a. He explained that studies had discovered that the test "found a significant number of false positives in people who were mentally retarded who weren't facing any court charges." *Id.* Such flaws in the way that malingering is tested further highlight why an indication of malingering should not be automatically presumed to trump other substantiated evidence of mental retardation.

B. The lower courts also are split regarding the use of post-incarceration evidence to assess a person's adaptive functioning, the second part of Alabama's three-part test. On one side of the split, the Court of Criminal Appeals in this case allowed post-incarceration evidence of adaptive behavior to trump all other contradictory evidence of prior deficits. In particular, the court ignored evidence regarding Mr. Morris's childhood, including his school records —

which demonstrated serious and sustained deficiencies, Clerk's Record (Second Supp. Record) at 382–86 — as well as testimony from Mr. Morris's family regarding his limitations, Nov. 26, 2007 Hearing Tr. (Supp. Record Vol. 2) at 39, 71–75, 79. Courts in the Fourth and Fifth Circuits and the Florida Supreme Court have adopted reasoning similar to that of Alabama. *See* Pet. 20–21, citing *Walker* v. *Kelly*, 593 F.3d 319, 328 (4th Cir. 2010); *Maldonado* v. *Thaler*, 625 F.3d 229, 243 (5th Cir. 2010); *Thomas* v. *Quarterman*, 335 Fed. Appx. 386, 389 (5th Cir. 2009); and *Jones* v. *State*, 966 So. 2d 319, 328 (Fla. 2007).

On the other hand, courts in the Eleventh Circuit and in Mississippi have applied a standard that places the principal focus on *pre*-incarceration deficits when determining a defendant's adaptive functioning. *See Holladay v. Allen*, 555 F.3d 1346 (11th Cir. 2009); *Doss v. State*, 19 So. 3d 690 (Miss. 2009). Both courts in *Holladay* and *Doss* refused to credit evidence of *post*-incarceration adaptive behavior over evidence of deficiencies prior to incarceration. In fact, the court in *Doss* criticized and ultimately rejected use of certain post-incarceration evidence because of its fundamental unreliability. *Id.* at 714 (rejecting evidence from adaptive-functioning tests that "were not normed for a prison population"). As with evidence of malingering, evidence of post-incarceration adaptive functioning may be significantly flawed due to the "highly restricted and restrictive environment" of prison. *See Holladay*, 555 F.3d at 1358 n. 16. For this reason, it is critical that courts not allow evidence of post-incarceration adaptive behavior to

trump all other credible evidence of adaptive deficits from before an individual's time in prison.

II. The Court's Reversal On the Questions Presented Would Affect the Result in This Case Because of the Overlap of Evidence Presented for All Three Parts of Alabama's Test.

As an initial matter, the State's opposition splits up both questions presented in an apparent attempt to suggest that a reversal on each individual question would have no effect on Mr. Morris's situation. Naturally, a reversal on both questions would address just two of the three requirements of Alabama's three-part test. In this case, however, the decision of the Court of Criminal Appeals on the third and last part of the test — manifestation of mental retardation and significant deficits in adaptive behavior before age 18 — relied on evidence presented for the other two parts, and therefore a different outcome on the first two requirements would affect the outcome on the third requirement as well.

In particular, the Court of Criminal Appeals considered evidence of Mr. Morris's behavior in prison to overcome contradictory evidence establishing mental retardation before age 18. Such evidence of childhood mental retardation included that Mr. Morris had an IQ score of 73 at age six — an IQ score that *Atkins* considered as mentally retarded — and that he suffered from a sustained poor school performance. Nevertheless, the decision of the Court of Criminal Appeals overlooked this evidence of childhood mental

retardation and significant deficits and instead credited evidence of Mr. Morris's prison-behavior, as well as the above-described malingering tests, *supra* at 2, to establish that his mental retardation did not begin before age 18. *See* Pet. App. 28a (crediting evidence of Mr. Morris's attempts to seek medical care in prison to trump testimony from his sister that he was "incapable of taking his temperature or taking medicine"). Without this evidence of malingering and post-incarceration behavior, the Court of Criminal Appeals would have had no choice but to confirm the evidence of Mr. Morris's mental retardation and severe behavioral limitations from childhood.

* * *

This case is a good vehicle for the Court to address the growing divisions among the lower courts as to the legal standards that should be applied for implementation of *Atkins*. Specifically, this case provides an opportunity for the Court to confront the troubling trend of courts allowing evidence of malingering and post-incarceration adaptive functioning to trump all other contradictory evidence demonstrating a defendant's mental retardation. This trend is particularly worrisome because experts in the field have highly criticized the tests used for determining malingering and the methods by which post-incarceration adaptive behaviors are evaluated.

Furthermore, crediting evidence of malingering and post-incarceration behavior necessarily favors the state, rather than the individual. Allowing evidence of malingering to foreclose a finding of mental retardation would mean that a defendant could

never rebut such evidence. Similarly, the state would always benefit from relying on post-incarceration behavior because the highly restrictive nature of prison would necessarily provide evidence of adaptive functioning, even though such evidence may not be indicative of an individual's actual limitations. The two issues presented provide an opportunity for the Court to inject clarity into these analyses and ensure that *Atkins* is properly implemented by the lower courts.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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